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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
DONALD T. VAUGHN, Superintendent,
State Correctional Institution at
Graterford, and ERNEST D. PREATE, JR.,
Attorney General of Pennsylvania,
Petitioners

V.

JAMES CLARK,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT FO CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. QUESTIONS PRESENTED

A. Has the state waived any defense of laches under Rule 9(a) by not raising this issue in the district court or in the appeal to the circuit court?

B. Does this Court's decision in United States v. Tucker require resentencing where the sentencing judge relied on prior convictions that were unconstitutional because they were obtained in violation of the defendant's due proces right to a juvenile transfer hearing?



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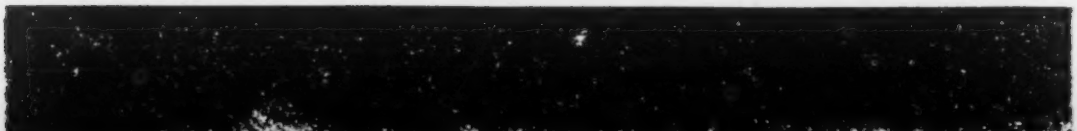
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IV. STATEMENT OF THE CASE

In 1973, while still a juvenile, respondent James Clark was charged with two assaults. Despite his juvenile status, Mr. Clark was prosecuted in the adult criminal court system and was never given a "transfer hearing" to determine whether he should be treated as a juvenile.

Contrary to the suggestion in the state's petition, there is no evidence that Mr. Clark at any time misstated his age. In fact, the record shows that when he was interviewed by Pretrial Services Division (an investigative branch of the Philadelphia Court System which gathers bail information), Mr. Clark stated that he was "only 17". This statement was recorded in the Pretrial Services report along with a date of birth which also indicated that Mr. Clark was a juvenile. In addition, the complaint in the first assault stated at the top, right after Mr. Clark's name, that he was a seventeen year old negro male ("17 N/M"). Both the Pretrial Services report and the complaint were placed in the official court file (known as the "Quarter Sessions file"). The record also shows, however, that the police arrest reports and the committment orders stated Clark's age as nineteen. The source of this erroneous information is not known.

Clark was represented by the same attorney in both cases. Clark alleged in his sworn applications that this attorney never



interviewed him or his family before trial to determine his correct age. The attorney never moved for a transfer to juvenile court.

In 1974 Clark pled guilty in the first assault case to conspiracy and attempted rape, and he was sentenced to a term of imprisonment of three to twenty-three months. In the second case, Clark was found guilty in 1974 of felonious restraint and sentenced to a term of imprisonment of eleven and one-half to twenty-three months.

In 1979 Clark was convicted of rape and robbery. At the sentencing in 1980, the prosecutor argued for a heavy sentence based on Clark's prior criminal convictions, and the judge, stating that he was considering the prior convictions, sentenced him to an aggregate term of twelve to twenty-five years in prison.[1]

Clark collaterally attacked his 1974 convictions in 1980 by filing a petition under the Pennsylvania Post-Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. Ann. §6322 (Purdon 1982). Clark argued that the adult court did not have jurisdiction since he was a juvenile, and that his defense counsel in 1974 and 1980 were ineffective for not raising this issue. The hearing court denied Clark's petition, finding that neither the court nor Clark's counsel in 1974 were aware of his true age. The court's decision

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[1] Although Clark told the sentencing judge that he was only 17 years old at the time of the prior offenses, defense counsel did not argue that these convictions were invalid or point out that Clark had been unjustly incarcerated as an adult without benefit of a transfer hearing. The state's characterization of the sentence as lenient is without support in the record. Moreover, under Pennsylvania law, Clark would not have been entitled to release automatically upon completion of the minimum part of his sentence since his parole had to be approved by the judge.

was upheld on appeal.

In 1985 and 1986 Clark filed two federal habeas corpus petitions attacking his two 1974 convictions, and a third petition attacking his 1979 conviction on the ground that his sentence in that case was improperly enhanced by the 1974 convictions. A United States magistrate recommended that the petitions be granted.[2] The district court rejected the magistrate's recommendation, and Clark appealed to the Third Circuit Court of Appeals.

The Third Circuit reversed the district court and remanded for resentencing on the 1979 conviction without consideration of the two 1974 convictions which the court found were unconstitutional. Initially, the court addressed the state's argument, raised at oral argument, that Clark had not exhausted his claim that the lack of a transfer hearing rendered his 1974 convictions unconstitutional.[3] Noting that this issue had not been addressed by the district court, the circuit court declined to conduct its own search of the record to determine whether the requirements of exhaustion were

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[2] The state inaccurately asserts in its petition for a writ of certiorari that the magistrate was the first to raise the argument that the 1974 convictions violated due process. While he may have not used the exact same language, Clark, in his amended habeas corpus petition filed May 5, 1987, argued that the two 1974 convictions were improper because Clark was a juvenile and did not have a transfer hearing. Thus, he argued, it was improper for the court to consider these convictions in sentencing Clark for the 1979 conviction, and defense counsel was ineffective for not raising this argument at that sentencing.

[3] The state never litigated this exhaustion argument in the district court, and it did not raise the argument in its brief to the Third Circuit.

met. Thus, the court expressly avoided deciding whether the due process claim had been fairly presented in the state courts. The court did not remand for reconsideration of the exhaustion issue by the district court because the case was already very old and such a remand would cause further delay and perhaps further appeals.[4] Instead, the court found that the requirement of exhaustion would be excused here since it would be futile at this late date for Clark to go back to the state courts to present his due process claim: if Clark, hypothetically, were to file a PCHA petition with the state courts in 1990, this hypothetical petition would be procedurally barred under state law because of prejudicial delay (A-15 - A-27). The court never stated, however, that the actual habeas corpus petitions filed by Clark were unreasonably delayed or that the state had been in fact prejudiced by any such delay.

Reaching the merits of Clark's due process claim, the court found that the facts had not been adequately developed at the state court hearing, and accordingly, could not be presumed to be correct. The court then found that the trial court in 1974 should have been aware of Clark's true age, and that its failure to provide Clark with a transfer hearing violated Clark's right to due process. This due process violation rendered the 1974 convictions unconstitutional, and their use at Clark's sentencing in 1980 was likewise unconstitutional. The court accordingly remanded the 1980

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[4] Clark has already served nearly ten years of his twelve to 25 year sentence. His minimum release date from Graterford State Penitentiary is August 6, 1992. Since the remedy requested in this case is resentencing, any further delay could render his habeas petition effectively moot.

case for resentencing without consideration of the 1974 convictions.

At no point prior to the decision of the Third Circuit did the state raise, as it does now, the affirmative defense of laches codified in Rule 9(a) of the Rules Governing Section 2254 Cases In the United States District Courts. While the case was before the district court, moreover, the state never alleged or attempted to prove under Rule 9(a) that Clark unreasonably delayed in filing his federal habeas petitions, or that the state was in any way prejudiced by such delay. Rather, the Rule 9(a) issue was raised for the very first time in the state's petition to the Third Circuit for a rehearing en banc. This petition for rehearing was denied on January 25, 1990.

V. SUMMARY OF ARGUMENT

The state has waived the affirmative defense of laches, codified in Rule 9(a) of the Rules Governing Section 2254 Cases In The United States District Courts, by not raising this defense at the district court level. There is no basis, moreover, either in the district court record or in the opinion of the circuit court to conclude that there was any prejudicial delay in Clark's filing of his habeas petitions. Thus, Rule 9(a) would not apply in any event. This issue, accordingly, is not worthy of review by the Supreme Court.

The circuit court's application of United States v. Tucker, 404 U.S. 443 (1972), to the facts of this case does not place the circuit in conflict with any other circuits or with the opinions of this Court. While Tucker invalidated a sentence that had been based in part on prior uncounseled convictions, the reasoning of that decision was not limited to violations of the right to counsel. In applying Tucker to the instant case, where the prior convictions were unconstitutional because of due process violations, the Third Circuit was following Tucker and was consistent with the circuits that have considered analogous issues. This Court, therefore, should not grant the writ of certiorari.

VI. REASONS THE WRIT SHOULD BE DENIED

POINT I

THIS COURT SHOULD NOT GRANT THE WRIT FOR THE PURPOSES OF REVIEWING THE RULE 9(a) LACHES ISSUE BECAUSE (A) THE STATE HAS WAIVED THIS AFFIRMATIVE DEFENSE BY NOT RAISING IT EARLIER, AND (B) NEITHER THE CIRCUIT COURT NOR THE DISTRICT COURT FOUND THAT CLARK UNREASONABLY DELAYED IN FILING HIS HABEAS CORPUS PETITIONS OR THAT THE STATE HAD BEEN PREJUDICED BY ANY DELAY.

The state never raised at the district court level or in the appeal to the circuit court the affirmative defense of laches codified in Rule 9(a) (Rules Governing Section 2254 Cases In the United States District Courts). The state has therefore waived this defense. Moreover, since this defense was not litigated below, there is no factual basis for concluding that under Rule 9(a), Clark's habeas petition should have been dismissed. The application of Rule 9(a) to this case, therefore, is not an appropriate issue on which to grant a writ of certiorari.

A. The state has waived the affirmative defense of Rule 9(a).

Rule 9(a) codifies the doctrine of laches as applied to federal habeas corpus petitions and it gives the government "what is in essence an equitable affirmative defense." United States v. Gutierrez, 839 F.2d 648, 651-52 (10th Cir. 1988). The government thus bears the burden of pleading and proving this defense and,

"[a]s with other affirmative defenses, this one is waived if it is not asserted in a timely fashion, in this case, in the answer to the petition." Liebman, Federal Habeas Corpus Practice and Procedure, vol. I, at 327, n. 13 (1988). This Court, moveover, has clearly expressed its "reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' -- in this case, the proceeding in the District Court -- is over." Granberry v. Greer, 481 U.S. 129, 132 (1987). Under Rule 9(a), then, the government's burden is to plead and prove at the district court level that the habeas petitioner unreasonably delayed in filing his petition, and that this delay prejudiced the government in its ability to respond. McDonnel v. Estelle, 666 F.2d 246, 251-53 (5th Cir. 1982). Circuits that have addressed the issue agree that the government must give the habeas petitioner notice of this Rule 9(a) defense, and the petitioner must have an opportunity to explain the delay and establish facts in support. Id; United States v. Gutierrez, 839 F.2d 648, 651 (10th Cir. 1988); Hill v. Linahan, 697 F.2d 1032, 1034 (11th Cir. 1983).

Here, the state has clearly waived the Rule 9(a) defense by not raising it in the district court. In addition, the state has failed to give Clark the required notice of its intent to rely on this defense or the opportunity to establish facts explain any delay that did occur. The circuit court, accordingly, acted properly in not addressing this issue, especially since the state waited until after the circuit court had issued its opinion to raise the defense. This issue, moreover, is not one over which the

circuit courts are in conflict. No circuit has ever ruled that a habeas petition should be dismissed when that defense had not been raised in the district court. This Court, therefore, should not grant certiorari.

B. Neither The Circuit Court Nor The District Court Found That The Elements Of The Rule 9(a) Defense Were Present In This Case

The state entirely misunderstands the opinion of the circuit court of appeals in this case. Contrary to the state's assertions in its petition, the circuit court did not find that Clark's due process claim had been waived in the state courts. Nor did the court find that Clark had delayed 16 years in filing his habeas petition, or that the state had been in fact prejudiced by any delay. Rather, the Court expressly stated that it would not conduct its own search of the record to determine whether the due process claim had been fairly presented to the state courts. Instead, it sought "alternate recourse to resolve the exhaustion issue" (A-19) which the state first raised at oral argument. The court held that the exhaustion requirement should be excused in this case since it would be futile for Clark to return to the state courts at this late date. In the context of this discussion of exhaustion, the court reasoned that if Clark, hypothetically, were to file a petition in state court today, it would be procedurally barred under state law because of prejudicial delay. Here, however, the court was referring only to a hypothetical petition,

not to the actual federal habeas petitions filed by Clark in 1985 and 1986. The court never stated that those actual petitions were unreasonably delayed, or that the state had been prejudiced.

Accordingly, there is simply no factual basis presented in the opinion of the circuit court or elsewhere in the record to support the state's claim of prejudicial delay under Rule 9(a). The issue therefore does not merit review by this Court.



POINT II

THIS COURT SHOULD NOT GRANT THE WRIT FOR THE PURPOSES OF REVIEWING THE APPEALS COURT'S APPLICATION OF TUCKER TO THE FACTS OF THIS CASE BECAUSE THE APPEALS COURT'S OPINION FOLLOWS LOGICALLY FROM TUCKER AND THE CIRCUIT COURTS ARE NOT SPLIT ON THIS ISSUE.

The decision of the Circuit Court here was clearly compelled by this Court's reasoning in United States v. Tucker, 404 U.S. 443 (1972). No other circuit court opinions, moreover, are in conflict with the Third Circuit on this issue. This case therefore does not present an issue appropriate for review by the Supreme Court, and the petition for a writ of certiorari should be denied under Rule 17.1 of the Rules of the Supreme Court of the United States.

In Tucker, this Court ordered resentencing because the sentencing judge had considered prior uncounseled convictions that were in violation of Gideon v. Wainwright, 372 U.S. 335 (1963). Although the specific facts of Tucker thus involved a Gideon violation, the Court did not limit its reasoning to these facts. Speaking in general terms, the Court stated:

> For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained. [Footnote omitted.]



> We agree with the Court of Appeals that the answer to this question must be "yes." For if the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding.

404 U.S. at 448.

It may be said with equal force that the real question in Clark's case is whether the sentence in the 1980 case might have been different if the sentencing judge had known that both of Clark's prior convictions had been unconstitutionally obtained. The answer must be "yes." If the judge in 1980 had been aware of the constitutional infirmity of the two prior convictions, the factual circumstances of Clark's background would have appeared in a dramatically different light at the sentencing proceeding.

A Gideon violation, moreover, is closely analogous to the due process violation that Clark suffered when he was not given a transfer hearing in 1974 to determine, as required under Kent v. United States, 383 U.S. 541, 557 (1966), whether he should be treated as a juvenile. Both types of constitutional violations go to the very integrity of the conviction. Just as assistance of counsel could avert a criminal conviction, so too, a transfer hearing could avert a criminal conviction by resulting in the defendant being treated as a juvenile instead of as an adult.

The difference between a criminal conviction and an adjudication of delinquency is fundamental. Indeed, the very premise of the Pennsylvania's Juvenile Act is that juveniles should be spared the onus of an adult criminal conviction. Instead of

punishment, the prime consideration is the best interests of the child and rehabilitation. See 11 P.S. §50-101(b)(2), recodified at 42 Pa.C.S.A. §6301(b)(2). A juvenile, for this reason, is spared many of the collateral consequences of a criminal conviction. He does not, for example, have a "criminal record," and he can participate in specialized treatment programs designed for juveniles. The courts, accordingly, view an adjudication of delinquency in a very different light than a criminal conviction.

Two recent decisions of this Court inferentially support the proposition that the Tucker doctrine is not limited to Gideon violations. In Johnson v. Mississippi, 486 U.S. 578 (1988), the Court held that a death sentence was unlawful because the sentencing jury had considered a prior conviction which was invalid because of denial of the right to appeal. One of the issues the defendant had sought to raise on appeal involved the voluntariness of his confession. In Maleng v. Cook, 109 S.Ct. 1923, 1927 (1989), a habeas petitioner alleged that his sentence was invalid because the court had considered a prior conviction that was infirm because he had not been mentally competent. Although the Court limited its holding to the issue of jurisdiction, it did not question the proposition that resentencing would be required if the conviction were ruled invalid on grounds of incompetence. Thus, considering the reasoning of Tucker and more recent decisions of this Court, it is clear that the circuit court opinion here follows logically from these decisions.

Other circuit courts that have addressed issues analogous to

the Tucker issue in this case have held in accord with the Third Circuit. The Sixth Circuit in Canary v. Bland, 583 F.2d 887, 890 (1978), held that a defendant had been denied effective assistance of counsel by the failure of his attorney to challenge an invalid prior felony conviction that was used as a basis for a habitual offender charge. The prior conviction was invalid because of deficiencies in the juvenile transfer proceedings. In Grandison v. Warden, Maryland House of Correction, 580 F.2d 1231, 1241-43 (1978), cert. denied, 440 U.S. 918 (1979), the Fourth Circuit, following Tucker, remanded the case for the sentencing judge to state whether he had considered prior invalid convictions in sentencing the defendant. Those prior convictions were invalid because the defendant had been convicted under a juvenile statutory scheme that had been struck down.[5] Accord, United States v. Burt, 802 F.2d 330, 334-35 (9th Cir. 1986)(prior conviction which was invalid because of fifth amendment violation could not be used for purposes of dangerous special offender statute); Rutledge v. Sunderland, 671 F.2d 377, 381-82 (10th Cir. 1982)(prior conviction which was invalid because juvenile certification law violated equal protection could not be used as basis for recidivist conviction); Brown v. United States, 610 F.2d 672 (9th Cir. 1980)(Tucker extends

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[5] The state misinterprets Grandison when it argues that this decision is in conflict with the Third Circuit's decision in the instant case. Petition for Writ of Certiorari, p. 23. While the court in Grandison did hold that it would not extend Burgett v. Texas, 389 U.S. 109 (1967), to bar the use of the invalid prior convictions to impeach the defendant at his trial, the court nonetheless did not hesitate to apply Tucker in ruling that these same convictions could not be used to enhance the sentence. 580 F.2d at 1238 - 1243.

to claim that prior conviction was unconstitutional because of ineffective assistance of counsel); United States v. Martinez, 413 F.2d 61, 63 (7th Cir. 1969)(prior conviction which was invalid because it was based on an involuntary guilty plea could not be used to enhance punishment pursuant to second offender statute).

No circuits are in conflict with the Third Circuit opinion in this case. Contrary to the state's claim in its petition, there is no intra-circuit conflict with Third Circuit's earlier opinion in United States v. Graves, 554 F.2d 65 (1977). Graves dealt with a separate issue -- the use of a prior conviction as an element of an offense. The defendant was charged with possession of a firearm by a convicted felon, and he challenged the use of the prior felony on the grounds that he had been a juvenile at the time and was denied the due process requirements of Kent at his transfer hearing. The court held that Congress intended that all felons, even those whose prior convictions might be invalid, be prohibited from possessing firearms unless and until that invalidity was recognized by a court. In view of this intent, the court was unwilling to extend the protections of Burgett v. Texas, 389 U.S. 109 (1967),[6] to these facts. 554 F.2d at 80-83. In the instant case, however, Clark challenges the use of a prior invalid conviction to enhance his sentence, and there is no question of congressional intent. Graves is simply inapposite when prior convictions are used to determine

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[6] In Burgett v. Texas, the Court invalidated a conviction under a recidivist statute where the state had relied on prior convictions that were uncounseled in violation of Gideon v. Wainwright, supra.

punishment rather than to define the offense. See United States v. Clawson, 831 F.2d 909, 914 (9th Cir. 1987), cert. denied, 109 S.Ct. 303 (1988). For the same reasons, there is no conflict with the Sixth Circuit's opinion in United States v. Maggard, 573 F.2d 926 (1978), since that case also dealt only with the use of a prior conviction to define the offense.

The only limitation that circuit courts have placed on the scope of Tucker is a limitation that follows logically from this Court's decision in Stone v. Powell, 428 U.S. 465 (1976). There, this Court ruled that habeas relief would not be granted for fourth amendment violations where there had been an opportunity for full and fair litigation of the claim in the state courts. The Court's reasoning was that the principal purpose of the fourth amendment exclusionary rule is to deter police misconduct, and that this rationale was not sufficiently strong to warrant allowing collateral attacks based on fourth amendment claims. Based on this reasoning, the Ninth Circuit in Tisnado v. United States, 547 F.2d 452, 457 (1976), held that since a Tucker-type challenge to a prior conviction is essentially a collateral attack, relief would not be granted in such cases for fourth amendment violations as long as there had been a full and fair opportunity to litigate the claim. See also United States v. Penta, 475 F.2d 92 (1st Cir. 1972), cert. denied, 414 U.S. 870 (1973). Tisnado, therefore, is not in conflict with the Third Circuit opinion in this case, but rather, is an opinion dealing with a very different type of constitutional claim.

The circuit court opinion in this case, therefore, is not in conflict with either the precedents of this Court, or with the decisions of other circuit courts. The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

DAVID L. McCOLGIN
Assistant Defender

IN THE UNITED STATES SUPREME COURT

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RONALD D. CASTILLE, District Attorney of Philadelphia County	:	
DONALD T. VAUGHN, Superintendent State Correctional Institute at Graterford	:	
and ERNEST D. PREATE, JR., Attorney General of Pennsylvania,	:	
	:	NUMBER 89 -
V.	:	
JAMES CLARK, Respondent	:	

CERTIFICATE OF SERVICE

I, David McColgin, Staff Attorney, Federal Court Division, Defender Association of Philadelphia hereby certify:

1. That I am a member of the Bar of this Court.

2. On May 25, 1990, I caused two copies of the Motion for Leave to Proceed Informa Pauperis, and the Respondent's Brief in Opposition to Petition for Writ of Certiorari to be deposited in the United States Post Office with first-class postage prepaid addressed to Gaele McLaughlin Barthold, Deputy District Attorney, Office of the District Attorney, 1421 Arch Street, Philadelphia, Pennsylvania 19102.

Respectfully submitted,

David McColgin

DAVID L. McCOLGIN

DATE: 5/25/90